SERVICE ON AGENT HELD INVALID

National Equip. Rental, Ltd. v. Szukhent
311 F.2d 79 (2d Cir. 1962)

Plaintiff, a Delaware corporation having its principal place of business in New York, brought suit on a farm equipment lease in the United States District Court for the Eastern District of New York against defendant Michigan residents who were allegedly in default thereunder. The lease designated an agent for service of process in New York, and process was served on the purported agent. Defendants were notified of the suit by the agent and also by plaintiff, although notice was not required by the terms of the lease. Defendants moved to quash service of summons on the ground that no agency relationship existed between themselves and the person designated in the lease as agent. The district court held that the service was invalid. The court of appeals affirmed, holding that the lease did not create a valid agency. Judge Moore dissented, stating that the agreement was not against public policy, that the provisions allowing for service in New York undoubtedly formed a material part of the consideration for the lease, and that there was no prejudice to defendants since they had received actual notice of service of process.[1]

The basic question raised by this case is whether or not an agent for service of process was appointed as required by Rule 4 (d) (1) of the Federal Rules of Civil Procedure.[2] Unless the appointment of the agent was valid, service of summons was properly quashed, and under Rule 4 (f) of the Federal Rules of Civil Procedure no jurisdiction over the person of defendants could have been obtained by the district court sitting in New York.[3] In order to create a valid agency for the service of process, an express appointment for that specific purpose must be made.[4]

On the facts of the instant case, it seems clear that the purported agent was expressly designated to receive service of process. The court, however, required that consent by the agent to act for his principal must appear either in the lease or in a separate agreement. To create the rela-

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[1] National Equip. Rental, Ltd. v. Szukhent, 311 F.2d 79 (2d Cir. 1962), *cert. granted*, 372 U.S. 974 (1963).

[2] Fed. R. Civ. P. 4 (d) (1):

Service shall be made as follows:

(1) Upon an individual other than an infant or an insane person . . . by delivering a copy of the summons and complaint to an agent authorized by appointment or by law to receive service of process.

[3] Fed. R. Civ. P. 4(f): "All process other than a subpoena may be served anywhere within the territorial limits of the state in which the district court is held."

[4] Schwartz v. Thomas, 222 F.2d 305 (D.C. Cir. 1955); Hardy v. O'Daniel, 16 F.R.D. 355 (D.D.C. 1954); Morfessis v. Marvin's Credit, Inc., 77 A.2d 178, 26 A.L.R. 2d 1082 (D.C. Munic. Ct. App. 1950); 2 Moore's Federal Practice 931 (1962).

tionship of principal and agent, mutual consent is required.[5] Defendants in the instant case manifested their consent to the agency by signing the lease. Plaintiff's contention was that the agent consented by accepting service of process and acting as if she were defendants' agent.

The court attempted to draw an analogy between the lease agreement and the problem presented by the nonresident motorist statutes, citing *Wuchter v. Pizzuti*.[6] In that case, service of process on the secretary of state in the state where the motor vehicle accident occurred was held invalid because there was no notice requirement in the statute, even though notice was actually given.[7] Non-resident motorist statutes, however, involve an appointment by operation of law in a non-consensual transaction rather than an appointment by voluntary authorization.[8] These statutes provide for a fictional appointment of the secretary of state as an agent for service of process when an out-of-state motorist is sued by a person injured in an accident happening within the state. A provision in the statute for notice to the defendant is required as an element of due process of law under the fourteenth amendment.[9]

The constitutional requirement for a notice provision is imposed with respect to a statute, but is not necessarily applicable to a provision in a private contract. This court conceded that there is no requirement of a notice provision when the parties freely contract for a method of substituted service,[10] but found that the lease agreement was a contract of adhesion, and that the lack of a notice provision might be considered in "determining the meaning and effect of the provisions of the contract." [11] A contract of adhesion exists when the weaker party, in need of goods or services, must submit to a disadvantageous term imposed by the stronger party, either

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[5] Restatement, Agency 2d §15 (1958), requires a "manifestation by the principal to the agent . . . and consent by the agent." Comment (a) states:

> It is only when the person acting believes reasonably, from conduct for which the other is responsible, that he is authorized so to act that there is an agency relationship.

See Restatement, Agency 2d §26, comment (a) (1958)

> It is not essential to the existence of authority that there be a contract between the principal and agent, or that the agent promise or otherwise undertake to act as agent.

See also Restatement, Agency 2d §16 (1958), which states that it is not necessary that consideration move between the parties to create the relationship of principal and agent.

[6] 276 U.S. 13 (1928). N.J. Stat. Annot. §39:7-2 (b) (1941) is the successor of the statute involved in Wuchter v. Pizzuti. Notice is now required to be given to the defendant.

[7] See Hess v. Pawlowski, 274 U.S. 352 (1927). The constitutionality of the non-resident motorist statute was upheld. The Massachusetts statute, the predecessor of Annot. Laws Mass. 90:3A (1955) required that notice be given.

[8] Fed. R. Civ. P. 4 (d) (1).

[9] See Hess v. Pawloski, *supra* note 7.

[10] National Equip. Rental, Ltd. v. Szukhent, *supra* note 1, at 80.

[11] *Ibid.*

because such term is in general use or because the weaker party is in no position to bargain freely. Standardized contracts may be contracts of adhesion, *e.g.*, a contract of insurance or a promissory note. If the contract is basically unfair, either because of the nature of the term imposed or because of the nature of the contract, courts should protect the weaker party from the stronger. Where, however, the actual operation of the contract has been fair, the need for such protection disappears. The stronger party as well as the weaker is entitled to fair treatment in a court of law. Here, it is difficult to see the unfairness to defendants since actual notice was received both from the agent and from plaintiff.[12] The only possible unfairness would be in requiring defendants to litigate in a distant forum.

The appointment of an agent for service of process under Rule 4(d)(1) is analogous to the appointment of an attorney to confess judgment in an action on a cognovit note.[13] In such a situation, the debtor appoints an attorney to confess judgment against him without notice or service of process. A cognovit note is a stronger example of a contract of adhesion than is the lease agreement in the instant case, yet many courts have upheld its validity. Moreover, a cognovit note is subject to an objection not present in this lease since the language is generally so confusing that the debtor does not understand the obligation he incurs by signing the note.

The instant case is in conflict with *Kenny Constr. Co. v. Allen*.[14] In *Kenny*, defendant agreed, in a private construction contract, to the appointment of the clerk of courts as its agent for service of process within the District of Columbia. The court held that the service was valid, stating that unless the language used was unclear, the court could not consider evidence beyond the terms of the contract. The majority in the instant case seems to assume that the language of the lease is unclear because it did not require that notice of service be given to defendants. The district court heard evidence which showed that defendants did not know the agent. According to the dissenting opinion, this evidence was admitted

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12 See generally Kessler, "Contracts of Adhesion—Some Thoughts About Freedom of Contract," 43 Col. L. Rev. 629 (1943).

13 See Ferson, "Irrevocable Powers: Cognovit Notes," 10 Duke L.J. 216 (1961). The same considerations are involved in both situations, *i.e.*, convenience in the collection of debts or the reducing of debts to judgment. Such procedures become necessary as long range business transactions become more commonplace. Some courts have commended the use of the cognovit note. See Pirie v. Conrad, 97 Wisc. 150, 153, 72 N.W. 370, 371. Some states uphold the validity of cognovit notes by statute. See Mich. Stat. Annot. § 27A. 2906 (1963); N.Y. Civil Practice Act § 540 (1960). However, Indiana makes it a misdemeanor to possess a cognovit note. Ind. Annot. Stat. § 2-2906 (1933). Arizona also prohibits their use. Ariz. Rev. Stat. Annot. §6-629 (1956). See Kervin, "Lloyds of London and Problems Arising by Reason of Its Business in This Country," 1954 Ins. L.J. 406, 411-12 (1954).

14 248 F.2d 656 (D.C. Cir. 1957). In Green Mountain College v. Levine, 120 Vt. 332, 139 A.2d 882 (1958), a suit was brought upon a note in which the secretary of state was designated as defendant's agent for service of process. The Supreme Court of Vermont held that the service upon the secretary of state was valid and that the defendant assumed the risk of non-notification.

not to clarify an ambiguous phrase, but to make a clear and concise phrase ambiguous.[15] As a result, the agency intended by the parties was defeated.

The only distinguishing factor between the instant case and the *Kenny* case is that here the purported agent was an individual and an employee of plaintiff. This should, however, have no effect upon the outcome of the case if defendants were aware of it when they agreed to the appointment.[16] This is especially true in view of the fact that the agent gave notice. Defendants in the instant case did not allege fraud, duress, or other grounds for avoiding or changing the contract. However, if fraud were a relevant factor in a similar case, defendant could move to quash service of summons. If the case proceeded to judgment, defendant might take advantage of Rule 55 (c) of the Federal Rules of Civil Procedure, which provides for the setting aside of default judgments, and Rule 60 (b) of the Federal Rules of Civil Procedure, which provides for the relieving of a party from final judgment. The holding of this court, that a notice requirement was essential to the validity of the provision of the lease authorizing service of process on defendants' purported agent, as the dissent points out, is the "essence of formalism,"[17] and it defeated a legitimate objective of the contract. Defendants in the instant case received timely notice of service and were not prejudiced by the omission of a notice requirement in the lease.[18] Defendants agreed to submit to the jurisdiction of the court in New York and should have been held to their agreement.[19]

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[15] National Equip. Rental, Ltd. v. Szukhent, *supra* note 1, at 81. The phrase which the court interpreted is "'. . . and the lessee hereby designates Florence Weinberg, 47-21 Forty-first Street, Long Island City, New York, as agent for the purpose of accepting service of any process within the state of New York.'"

[16] *Ibid.* Under the rule stated in the Restatement, Agency 2d §23 (1958), one whose interests are adverse to another may be authorized to act for that other provided he reveal the existence and extent of the adverse interest. For the agent to conceal such information is a breach of duty.

[17] National Equip. Rental, Ltd. v. Szukhent, *supra* note 1, at 83.

[18] Rule 4 (d) (1) should be construed liberally in order to effectuate service where actual notice has been received. Rovinski v. Rowe, 131 F.2d 687, 689 (6th Cir. 1942); Owens v. Harkins, 18 F.R.D. 62 (M.D. Ala. 1955); Zukerman v. McCulley, 7 F.R.D. 739 (E.D. Mo. 1947). See also Restatement, Conflict of Laws §81, Illustration 5 (1934); Restatement, Judgments § 18 (1942).

[19] After this note was completed and in the process of being printed the United States Supreme Court reversed and remanded this case. National Equip. Rental, Ltd. v. Szukhent, — U.S. —, 84 S. Ct. 411 (1964).